1987

Dukane Corporation v. Bonnie Birch : Brief of Appellant

Utah Supreme Court

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DOCKET NO. 870015

IN THE SUPREME COURT OF THE STATE OF UTAH

DUKANE CORPORATION,	:	
Plaintiff/Respondent.	:	
VS.	:	CASE NO:
BONNIE BIRCH,	:	870015
Defendant/Appellant.	:	#146
	:	

BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, DENYING THE DEFENDANT'S MOTIONS TO SET ASIDE THE DEFAULT JUDGMENT.
HONORABLE TIMOTHY R.HANSON, JUDGE.

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LIST OF PARTIES

DUKANE CORPORATION
A DELAWARE CORPORATION,

PLAINTIFF,

VS.

CRANNEY PRODUCTIONS INC.
A UTAH CORPORATION

JACK W.CRANNEY

BONNIE BIRCH CRANNEY

DEFENDANTS.

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IN THE SUPREME COURT OF THE STATE OF UTAH

DUKANE CORPORATION,	:	
PLAINTIFF/ RESPONDENT	:	
VS.	:	
BONNIE BIRCH,	:	CASE NO: 870015
DEFENDANT/ APPELLANT.	:	
	:	

STATEMENT OF ISSUES

The issues in this case are as follows:

1. Whether the lower court abused its discretion in denying appellant's motions to set aside the default judgment ?

2. Whether it was an error to enter a default judgment without considering the merits of the case and due process safeguards ?

3. Whether the " Scheduling Order and Trial Notice " as used by the District Court to enter a default is proper in terms of its draft and in the face of due process requirements ?

4. Whether the lower courts should consider certain guidelines or consider certain elements of substantive and procedural law in entering and finalizing dafault judgments ?

STATEMENT OF THE NATURE OF THE CASE

The appellant, Bonnie Birch, appeals from the Order of the Third District Court denying her motions to set aside a default judgmetn in the sum of $ 200,000.00 becuase she failed to appear at the time of pre-trial conference.The suit was commenced against three defendants based on a surety agreement for services and goods received by the other two defendants, Jack W.Cranney and Cranney Productions Ltd. Defendants Jack W. Cranney and Cranney Productions Ltd., filed their asnwers admitting the surety agreement and receipts of services and goods while defendant Bonnie Birch who is now divorced from defendant Jack W.Cranney filed an answer denying signing the surety agreement and receiving any goods and services based on said surety agreement.Appellant contended that her signatures were forged by her then estrnaged husband. Appellant also went through the deposition but failed to appear at the pre-trial conference as she claimed that she did not receive any notices.In the course of proceedings her attorney withdrew as she could not afford him. The first notice of pre-trial conference was mailed to him. Her answer was stricken by the court at the time of pre-trial conference on May 5,1987 and a judgment was entered against her on May 13,1987. A motion to set aside the default judgment was filed on October 5, 1986, pursuant to the provisions of the Rules 60(b) and 55 (c) of the Rules of Civil Procedure. Said

motions were denied as the court ruled them untimely. A notice of appeal was filed properly on the 30th day of December 1986.

PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

1. Respondent, Plaintiff below, filed an action on May 13,1985 to recover for the goods and services rendered to the defendants based on a guaranty deed which limited the claim of the plaintiff to a total of $ 200,000.(Record Index No:26 &27).

2. Proper Answers were filed by the defendants.

3. Defendants Jack W.Cranney and his business entity known as Cranney Productions Ltd. admitted the validity of the guaranty deed and the receipt of goods and services.

4. Appellant, defendant below, at that time known as Bonnie B.Cranney, denied signing the guaranty or receiving any goods or services.

5.Appellant was represented by Kay M.Lewis Esq., who withdrew later as she could not afford a counsel.

6. A partial summary judgment was entered against the Cranney Production Ltd., on December 27,1985 in the sum of $ 282,056.42.

7. A default judgment was entered against appellant in the sum of $ 200,000.00 on May 5, 1986, as she failed to appear at the pe-trial conference. [RI:54]

8. A series of motions to set aside the default judgment was commenced by the appellant starting the first one

on October 5,1986 and the last one being denied on the 16th day of December 1986, thus followed by a timely Notice of Appeal on the 30th day of December 1986.

STATEMENT OF FACTS

The following facts are submitted :

1.The Complaint filed by the plaintiff below did not allege that appellant has received any goods and services from the plaintiff.[RI:2-3]

2.Appellant denied signing of the guaranty document in her Answer [RI:8-9A] and acknowledged in the Memorandum of Stephen B.Mitchell Esq., attorney for respondent, in support of his Motion for a partial summary judgment against Cranney Productions Ltd. [RI:21]

3. Defendant Jack W.Cranney, ex-husband of the appellant signed the guaranty papers [RI:26-27] on the 29th day of March 1984, and the same day visited the offices of his then legal counsel, Carman Kipp to file for a divorce from the appellant and issues a chek to Mr.Kipp, a copy of which is attached herewith made part hereof as Exhibit: A.

4. Handwriting expert, John D.Moyes, finds that the signatures of appellant,Bonnie B.Cranney, with a high degree of probability may have been produced by the writer of the other signatures. [RI:99] The original Guaranty document is in the possession of respondent who,has refused its availability to Mr.Moyes or any other handwriting expert.

5. Affidavit of Donna W.Hagio states that Jack W.Cranney, as a routine signed papers on behalf of his then wife . (the appellant). Affiant was an employee of Jack W.Cranney and was still working on the 29th day of March 1984.

6. That after a full trial on the divorce matter of Jack and Bonnie Cranney the Honorable Judith M.Billings ruled as part of the Divorce Decree that Jack W.Cranney, a defendant below, was obligated to pay the Dukane (Respondnet herein) obligation. [Record Index No: 69]

7. That the Guaranty [RI:26] which is the basis of this action limits its claim to a sum of $ 200,000. and the Complaint filed by the respondent does not allege or claim that the defendants are liable separately for said sum but the lower Court has awarded three different judgments in the sums as follows :

I. Partial summary judgment against Cranney Productions dated: 12.27.85 in the sum of $ 282,056.42 [RI:45-46]

II. Default Judgment against the appellant dated: 5.13.87. in the sum of $ 200,000.00 [RI:58-59]

III. Summary Judgmment against defendant Jack W.Cranney dated: 4.15.87 in the sum of $200,000.00.

(No Record Index, since Request for Transcript filed prior to the entry and signing of this judgment)

8. The Court records show that the Certificate of Readiness for Trial and the Original Order for Scheduling

Conference were mailed to the former legal counsel,Kay M.Lewis Esq., of appellant [Record Index NO:43 & 48] and she therefore, was not expecting anything until informed , being pro se.

9.Appellant had denied receving any notices from the court concerning any pre-trial conference and she has also denied in her affidavit of knowing the nature of the proceedings especially caught in her divorce matter as well [RI:62-72]

10. Appellant has also shown that she did not recieve some of her mail as it was sent back or forwarded to her ex-husband who has put a change of address. [RI.62-72 & 100]

11. That until a divorce between the defendants Jack and Bonnie Cranney their last names were the same as: Cranney.

12. That the Scheduling Order and Trial Notice does not provide for a default judgment since its contents do not spell out that a default judgment shall be entered in case a party fails to respond or show up pursuant to the provisions of Rule 4(c) of the Rules of Civil Procedure.[RI:56]

13. That the lower Court has not only stricken the pleadings of appellant but also entered a default judgment simultaneously even though neither the caption nor the contents of the "Scheduling Order And Trial Notice " provide for such a penalty as a default judgment. [RI:56 & 57]

14. That at the time of entering the default the lower court had the notice that appellant was taking care of her legal matters pro se [RI: 50]

15. That appellant not knowing the legal process did call several times the offices of Stephen B. Mitchell Esq., attorney for respondent and did write a letter to Mr.Mitchell to take care of the default judgment. A copy of said letter is attached herewith and made part hereof as Exhibit: B.

16. That appellant though not knowing the 3 month time limit to set aside the default still acted dutifully and diligently to resolve this matter as she wrote a letter to Mr.Mitchell and respondent on July 10, 1986, when her phone calls were not returned.Exhibit:B

17. That a default judgment against her was entered on May 13,1986. [RI:58].

18. That appellant was also available for her deposition on October 28,1985 at the request of respondent's attorney.

SUMMARY OF ARGUMENT

The lower court abused its discretion in denying appellant's motion to set aside the default judgment in that it failed to consider and ponder the factors,purposes, and guidelines set by the Rules and the higher court decisions as outlined in each point of argument specially ignoring lack of notice in the face of due process requirements.

ARGUMENT

POINT I

A COURT SHOULD CONSIDER THE FOLLOWING FACTORS IN EXERCISING ITS DISCRETION IN GRANTING OR DENYING A MOTION TO SET ASIDE A DEFAULT JUDGMENT UNDER RULES 55(c) AND 60(b):

1. Whether the plaintiff will be prejudiced;
2. Whether the defendant has a meritorious defense;
3. Whether the default was the result of the defendant's culpable conduct.

United States v. $55518.05 in U.S.Currency 728 F.2d.192 (1984) The threshold question in this case is whether appellant has established a meritorious defense.Defendant in this case has not merely stated denials as defense but has actually shown more in another matter (D84-1130) that she did not sign the guaranty which is the basis of the respondent's action. Statements of other witnesses in the Statement of Facts clearly prove that there is a good evidence for her defense which is more than mere denials. The showing of a meritorious defense is accomplished when allegations of defendant's answer, if established on trial, would contitute a complete defense to the action. Tozer v.Charles A.Krause Milling Co., 189 F2d. at 244., Gross v. Stereo Component systems,Inc.700 F.2d. at 123.

Second question is that of prejudicial harm to plaintiff if the case is reopened. In this case plaintiff

has made no claim or showing that it would be prejudiced from reopening.The court should have weighed the other two factors and set aside the default judgment in the light of the boave cases and United Coin Meter Co. v.Seaboard C.R. 705 F.2d.839 (1983).

Thirdly, the element of culpable misconduct should have been weighed properly e.g. in this case defendant has not only properly filed the answer but also cooperated in other proceedings such as her deposition and her phone calls and letters to respondent's attorney to inqure about the matter.In fact her letter after the judgment to respondent's attorney after several calls on July 10.1986,shows her concern over her legal matters. Appellant was handling her divorce trial and this matter pro se with two opposing lawyers who only exchanged comments and information to their advantage as she has alleged in her affidavit instead of properly returning her calls. What else amounts to sex bias ? The poor person paid so much attention to these lagal matters that she was frantically filing all sorts of papers and the very bulk of such filings should have given an experienced lower court some idea as to the concern she has as opposed to any culpable misconduct.There is no wilful misconduct in this case which would warrant a default judgment. Wilful neglect is still an important factor in the use of discretionary sanctions. From Societe Internationale 357 U.S.197 (1958) to Notes of

Advisory Committee on Rules,28 U.S.C.A. Rule 37, at 45,47(Supp 1974).In Tucker Realty inc. v. Nunley, 396 P.2d. 410 (1964) the Utah Supreme Court clearly indicated that any such conduct must be wilful in order to impose such severe sanction.The record on appeal in this case fails to show any such wilful misconduct and/or neglect as to warrant a default judgment of $200,000.00. Instead it shows that the lower court had notice of defendant's pro se status [Record index No: 50] Defendant did not know anything about a pre-trial conference and was not on a look out and the lower court made an error in assuming and expecting irrationally from her specially in the light of Helgesen v. Inyangumia, 636 P.2d.1079, in which case the Utah Supreme Court in its wisdom considered the circumstances of a pro se party and the case by case approach to consider all the necessary elements of the Rules and the purposes of said rules.

POINT II

THE LOWER COURT MADE A SERIOUS ERROR IN USING THE ELEMENT OF DOUBT IN FAVOR OF RESPONDENT CONTRARY TO THE LIBERAL CONSTRUCTION OF THE RULES 55(c) and 60(b).

"In a case of reasonable doubt such discretion is usually exercised in favor of granting the application so as to permit a determination of the controversy upon the merits. In a number of instances, statutes, and codes and the Federal Rules of Civil Procedure, provide for the opening or vacating of default judgments, and such provisions are

liberally construed ". 46 Am Jur 2d. §686 page 837-838 Please also see:Rapoport v.Sirott, 418 Pa.50,209 A.2d.421 (1965); Scherrer v. Plaza Marina Commercial Corp. 16Cal.App. 3d 520, 94 Cal Rep.85 (1971);Southal v. Seaboard 39 Fla.Supp.124; GTE Automatic Electric v. ARC Industries 351 NE 2d. 113; and Cunningham v.White 390 So. 2d. 467 (1980).

It was an error to enter a default judgment specially in such a large sum as $200,000.00 because invoking such a drastic sanction is proper only in the CLEAREST OF CASES otherwise it just becomes a game instead of litigation based on merits and the spirit of justice as embodied in the rules and above-mentioned cases.It should be noted that the defendant had no pattern of any defiance to the Court orders. " When it appears that such relief is necessary to prevent manifest injustice to the party seeking it, that the granting of such relief will not place the adverse party at any disadvantage.." Brast v.Winding Gulf, 94 F.2d. 179; 161 A ALR pages 1161-1202; Emerick v.Duncan Co. 146 F.688.

The Second Circuit in Gili v.Stolow, 240 F.2d.669 (1957) stated :

In final analysis, a court has the responsiblity to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of wilful default. Id at 670.

In this case there is no such showing of a wilful default and the lower court's ruling based on three month time limit is simply technical and without regard to human circumstances and to the philosophy of case by case approach to achieve the ends of justice in all fairness.In fact reasonable time limitations under FR Civ Procedure 60(b) rests within sound discretion of trial court and absent abuse, it brings to bear more liberal attitudes where no intervening rights have been affected by passage of time between judgment and motion. Nowicki v.United States, 536 F. 2d. 1171.

In this case appellant just did not know the procedure otherwise she did act timely to correct the situation as she wrote a letter to the respondent and its attorney on July 10, 1988, which is within the three month time limits. Further she filed the motions to set aside the default without wasting any time as soon as she came to know the facts.

POINT III.

A NOTICE SHOULD GIVE THE NECESSARY INFORMATION AND MUST APPRISE THE PERSON WHOSE RIGHTS ARE TO BE AFFECTED OF WHAT IS REQUIRED OF HIM .....A NOTICE MUST BE CLEAR DEFINITE AND EXPLICIT, AND NOT AMBIGIOUS. THE NOTICE IS NOT CLEAR UNLESS ITS MEANING CAN BE APPREHENDED WITHOUT EXPLANATION OR ARGUMENT". 66 CJS §16 Notice pages: 653-654.

In this case appellant states that she never received the notice for pre-trial conference due to achange

of address made by her ex-husband.She further claimed that he has been removing the mail without her knowledge.But if the Court were to differ it should be noted that the pre-trial conference notice [Record Index NO: 54] does not specifically states that a default shall be entered in case of failure to appear . It should clearly state the penalty as required for summons under Rule 4(c) because " Notice to a person has been held to be binding on him only in the particular transaction in which it is given and will not affect him in a subsequent and independent matter". 66 CJS §19 Notice Page:669.
In this case it should be noted that it is only an " assumption" that striking the pleadings means a default but it does not convey any actual notice as required under the requirments of due process clause. Is it fair in the first place to assume, and secondly to assume that lay persons would or should know the meanings of legal terms and then even know the follow up procedure of such terms or actions ?

CONCLUSION

That the lower court has made errors in ignoring the rules and the cases and guidelines to exercise its discretion under Rules 55(c) and 60(b), therefore the default judgment entered in this matter be set aside and the ruling of the lower court be reversed so that the matter is decided on its merits.

RESPECTFULLY SUBMITTED:

this 10th day of June 1987.

IRSHAD A.AADIL
ATTORNEY FOR APPELLANT/
DEFENDANT.

CERTIFICATE OF MAILING

I, the undersigned hereby certify that I mailed four true and correct copies of the foregoing Brief Of Appellant to :

STEPHEN B. MITCHELL ESQ.,
Attorney for Respondnet/ Plaintiff
Burbidge & Mitchell
Attorneys at Law
139 East South Temple # 2001
Salt Lake City Utah 84111.

this 10th day of June 1987, postage prepaid.

EXHIBIT: A

July 10, 1986

BBrbidge & Mitchell
2001 Elks Building
139 E. South Temple
Salt Lake City, Ut. 84111

Attention: Richard D. Burbidge, Esq., #0492
Stephen B. Mitchell, Esq., #2278

Dear Sirs,

After several unsuccessful attempts to phone your office, I am writing this letter to urge your office to please settle the "Dukane" obligation....that is a judgement on "Bonnie Cranney".

According to the second clause of the divorce decree it reads: "Liens and claims against the house that are related to the business shall be assumed and paid by the plaintiff, including the Dukane obligation."

I am sending Dukane Corporation a copy of the decree and will advise them to put future correspondance to Mr. Jack Cranney.

Sincerely,

Ms. Bonnie Birch Cranney

Ms. Bonnie Birch Cranney

cc: Dukane Corporation